

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 22,223

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

611

DIANA KEARNY POWELL,

Appellant,

v.

NATIONAL SAVINGS AND TRUST COMPANY,

Appellee.

Appeal from a Final Judgment of the
United States District Court for
the District of Columbia

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 1 1968

Nathan J. Paulson
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DIANA KEARNY POWELL,

1500 Massachusetts Avenue, N. W.
Washington, D. C. 20005

Appellant.



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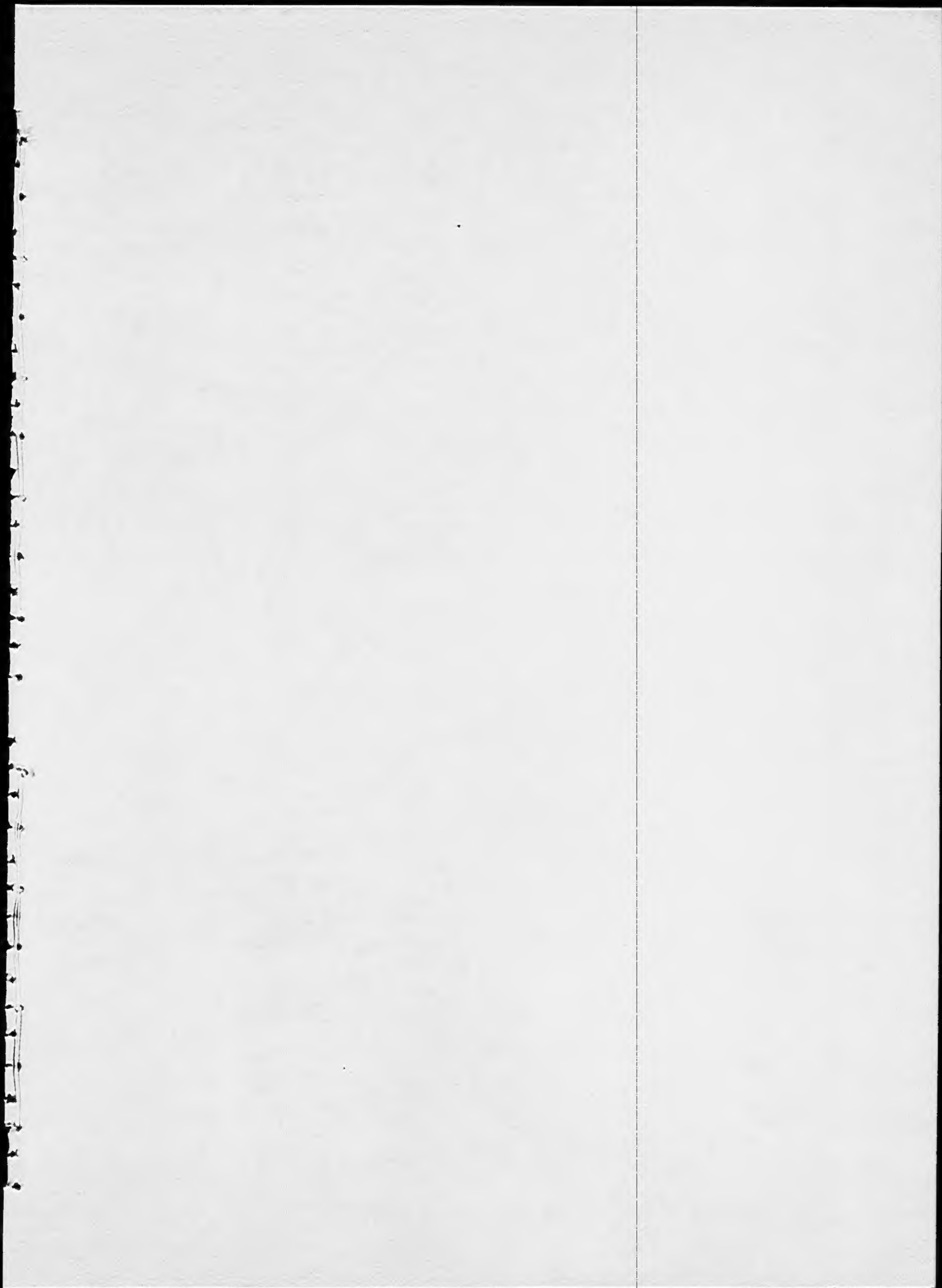
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Appeal from a Final Judgment of the
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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appeal is taken from a final judgment of the United States District Court for the District of Columbia dismissing with prejudice, on grounds of *res judicata*, a Complaint seeking on the grounds of fraud, misrepresentation, and mistake, to enjoin distribution of property. The issues presented are:

1. Is *res judicata* a defense to an action seeking relief by injunction from the fraudulent conveyance of property? Appellant contends that *res judicata* is not a defense when the prior judgment was obtained by fraud and misrepresentation.

2. Was Appellant deprived of the right to due process of law preserved to citizens under the Common Law, and under Amendments Four, Five, and Nine of the Constitution of the United States, by the action of the Court below in these respects:

- (a) By threatening to hold Appellant in criminal contempt should she present to the Court her ground for injunctive relief, that is, the fraud and misrepresentation of the Trustee and its attorneys.
- (b) By arbitrary dismissal of the Complaint because of the personal belief of the Court that a senior member of the law firm representing Appellee Trust Company, who was not present, would not participate in fraud or misrepresentation.

Appellant, Miss Powell, contends that both (a) and (b) are fatal, prejudicial errors.¹

¹ Prior related cases are *Powell v. Powell*, (on appeal, *Powell v. National Savings and Trust Co.*) 111 U. S. App. D. C. 290, 296 F.2d 412, cert. den. 368 U. S. 946, 7 L. Ed. 2d 343, 82 S. Ct. 307, rehearing denied 368 U. S. 1005, 7 L. Ed. 2d 547, 82 S. Ct. 597; *Powell v. National Savings and Trust Company*, 114 U. S. App. D. C. 269, 314 F.2d 274, cert. denied 379 U. S. 920, rehearing denied 379 U. S. 984; *Powell v. National Savings and Trust Company*, 384 U. S. 938, 384 U. S. 1027, 86 S. Ct. 1919; Administration No. 12,657, Estate of Diana Kearny Powell, widow, deceased (1905).

STATEMENT OF THE CASE

Plaintiff Diana Kearny Powell filed a Complaint for injunctive relief from fraudulent disposition of property, May 29, 1968. Motion of Defendant, National Savings and Trust Company, to dismiss the Complaint on the ground of *res judicata* was filed June 12, 1968. Plaintiff, Miss Powell, on June 18, 1968, filed Opposition to the Motion to Dismiss, and Request for Admissions as to the genuineness of documents which were records in related cases, specifically in *Powell v. Powell*, (C.A. 4051-55) the Complaint by Lucy Powell for appointment of the National Savings and Trust Company as Successor Trustee, showing that title to the property had vested in William Glasgow Powell, the testamentary trustee, who had died, and showing that the Appellee Trust Company had accepted the successor Trusteeship, without contest. These documents showed that distribution of property proposed by the Defendant Trust Company, which Plaintiff, Miss Powell, sought to enjoin, was predicated upon claims to title in conflict with the title of the trustee, and were raised for the first time by the Appellee Trust Company, after termination of the trust. Defendant Trust Company objected to the Request for Admissions on the ground that the record speaks for itself. Motion of Plaintiff Miss Powell to strike the Motion to Dismiss on grounds of *mala fides* was filed June 27, 1968. Hearing on the Motions before Judge Sirica on July 3, 1968, was resolved in favor of the Trust Company on all points (Order entered July 5, 1968) after the Court initiated the proceeding by warning plaintiff (Miss Powell) that he would find her in contempt of Court and incarcerate her if she argued the fraud and misrepresentation which were the grounds stated in her Complaint (Tr. 1, 3). The Court further stated, after repeated interruptions of Plaintiff's arguments, the Court's personal opinion of a senior member of the law firm representing the Defendant

Trust Company, who had never actively participated,

"You know who [he] is? He was a very fine member of our Bar, a very excellent lawyer. He used to be a member of the Grievance Committee. I don't think he is dishonest or anything at all. I don't think he'd represent a dishonest client" (Tr. 7).

Plaintiff's Motion to Reconsider and Set Aside the Judgment, on grounds stated in the Statement of Issues (p. 1), and her Objections to the form of Order as exceeding the ruling of the Court, submitted July 5, 1968, and entered on the docket July 12, 1968, were denied, by Order of July 18, 1968. Notice of Appeal was filed July 12, 1968.

ARGUMENT

I.

Judgments obtained by fraud are not *res judicata*. The Complaint seeks an injunction on the ground of fraud. Therefore, it is not barred as *res judicata*.

The law is well settled that judgments obtained by fraud, misrepresentation, or mistake, are not grounds to raise the defense of *res judicata*. In fact, the formal definitions generally except judgments obtained by fraud or collusion from the definition. The exception to the rule is stated in *New Orleans v. Gaines* (*New Orleans v. Whitney*) 138 U. S. 595, 34 L. Ed. 1102, 11 S. Ct. 428, as cited in 30A *Am. Jur.* p. 399), citing the earlier case of *Welch v. Mandeville* (U. S.) 1 Wheat. 233, 4 L.Ed. 79, and cited in *Guam Inv. Co. Inc. v. Central Building, Inc.*, 288 F.2d 19 (C.A. 9th, 1961):

. . . it is generally held that the principles of *res judicata* may not be invoked to sustain fraud, and that a judgment obtained by fraud or collusion may not be used as a basis for the application of the doctrine of *res judicata*.

The continuing efforts of Miss Powell to obtain judicial correction of this gross miscarriage of justice are evidence that she has not been negligent in presenting the facts, and the continuing fact of the fraud of the Defendant is plainly visible in its defense of *res judicata*. In *Bennett v. Commissioners of Internal Revenue*, 113 F.2d 837, 130 A.L.R. 369, the Court held:

The rule of *res judicata* is that one who has permitted a final judgment to go against him is estopped by that judgment from contending elsewhere, against the parties to it and their privies, that the fact or issue is otherwise than as there adjudged.

In *Powell v. Powell, supra*, the Trust Company accepted the title to the property as successor trustee, thereby admitting the validity of the title in the trustee. Yet after termination of the trust in 1958, it raised claims based upon the argument that title had finally vested, even prior to its own appointment, in persons who had died many years before termination of the trust, a patent error, brought to its attention repeatedly, which, however, it has continued to press upon the Court, while claiming spiraling fees against the estate. Such continuing action, over protest, could not possibly have been inadvertent, and therefore is fraud. *McNabb v. Thomas*, 88 U. S. App. D. C. 379, 190 F.2d 608, cert. den., 72 S. Ct. 86, 342 U. S. 859, 96 L.Ed. 646 (C.A.D.C. 1951); *Wynne v. Bonne*, 191 F.2d 220, 80 U. S. App. D. C. 363 (C.A.D.C.); *Zoslow v. National Savings and Trust Co.*, 91 U. S. App. D. C. 301, 201 F.2d 208. The fraud is, in fact, in plain evidence, deliberately perpetrated by the Trust Company, through lack of candor and subtle misrepresentation of material facts in the record. The Courts, in their prior decisions, have accepted these misrepresentations of the Trust Company on their face value, although their fallacy and deliberate fraud was brought to their attention, and should be apparent.

The conclusion that necessarily follows from the major and minor premises of the syllogism is that *res judicata* is not a defense to this Complaint to enjoin the fraudulent transfer of property.

II.

The Common law and Constitutional Amendments Four, Five, and Nine, protect the rights of Appellant, to due process and fair trial, which the Court has violated.

Appellant, Miss Powell, claims the right to a fair trial and to due process according to the rules of equitable relief. She claims the right to restrain by process issued from the Court the fraudulent transfer of property that belongs to her. These rights are protected by the common law and law of equity, as well as by Amendments Four, Five and Nine of the Constitution.

- (a) Appellant's rights to due process and fair trial were violated by threats by the Court to hold her in contempt if she presented the grounds for her allegations of fraud.

It is obvious that threats by the Court, to hold the Plaintiff, Miss Powell, in contempt, should she present her case in argument so impeded a fair presentation as to deprive her of due process and a fair hearing. The Court stated, at the very outset of the hearing on the motions:

THE COURT:

. . . I want you to understand one thing, I don't want you to call names, I don't want you to call people frauds, because if you get out of line, contemptuous, I will put you right in jail, is that clear to you?

MISS POWELL:

I understand that, Your Honor —

THE COURT:

Now just a minute, you listen to me. You have been litigating a long time on this matter and this is going to be your final chance in this court. If you do not obey the rulings of this court and stop talking when I tell you, I will consider citing you for contempt of court, is that clear to you?

Nothing appeared, or in fact existed, to warrant the threats, which themselves are prejudicial as suggesting improprieties and misconduct on the part of Miss Powell which did not exist. It is obvious that she is unable to present a case for relief from fraud without mentioning fraud and the persons she proposed to show were in collusion in perpetrating the fraud.

Plaintiff submits that the cited comments of the Court were arbitrary, capricious, and prejudicial, and deprived her of due process of law and a fair hearing.

(b) Personal prejudices of the Court deprived Plaintiff,
Miss Powell of basic rights, and suggests collusion.

The Court openly admitted bias, and that the decision of the Court was the product of bias and favoritism, and not of sound judgment on the record. At one point, the Court interrupted argument by Miss Powell to state (Tr. 7):

. . . You know who John E. Powell is? He was a very fine member of our Bar, and a very excellent lawyer. He used to be a member of the Grievance Committee. I don't think he is dishonest or anything at all. I don't think he'd represent a dishonest client.

The plaintiff also happens to know that Mr. Powell (no relation), is a personal friend of the judge. This fact, and the introduction of extraneous matter raises

an inference of collusion. The extent to which collusion, if any, in this and related cases may have taken place is, of course, not susceptible to proof. Collusion, however, is immaterial, since the threats and attempted intimidation of Miss Powell to suppress the charges of fraud involving the client and associate of a close personal friend of the judge is sufficient in itself.

Appellant submits the threats and intimidation to suppress presentation of allegations of fraud represent fatal error and arbitrary and capricious determination of the case which amount to fatal error and denial of due process under the principles enunciated by the Supreme Court in *Ochoa v. Hernandez*, 230 U. S. 139, 161, 57 L.Ed. 1427, 33 S. Ct. 1033.

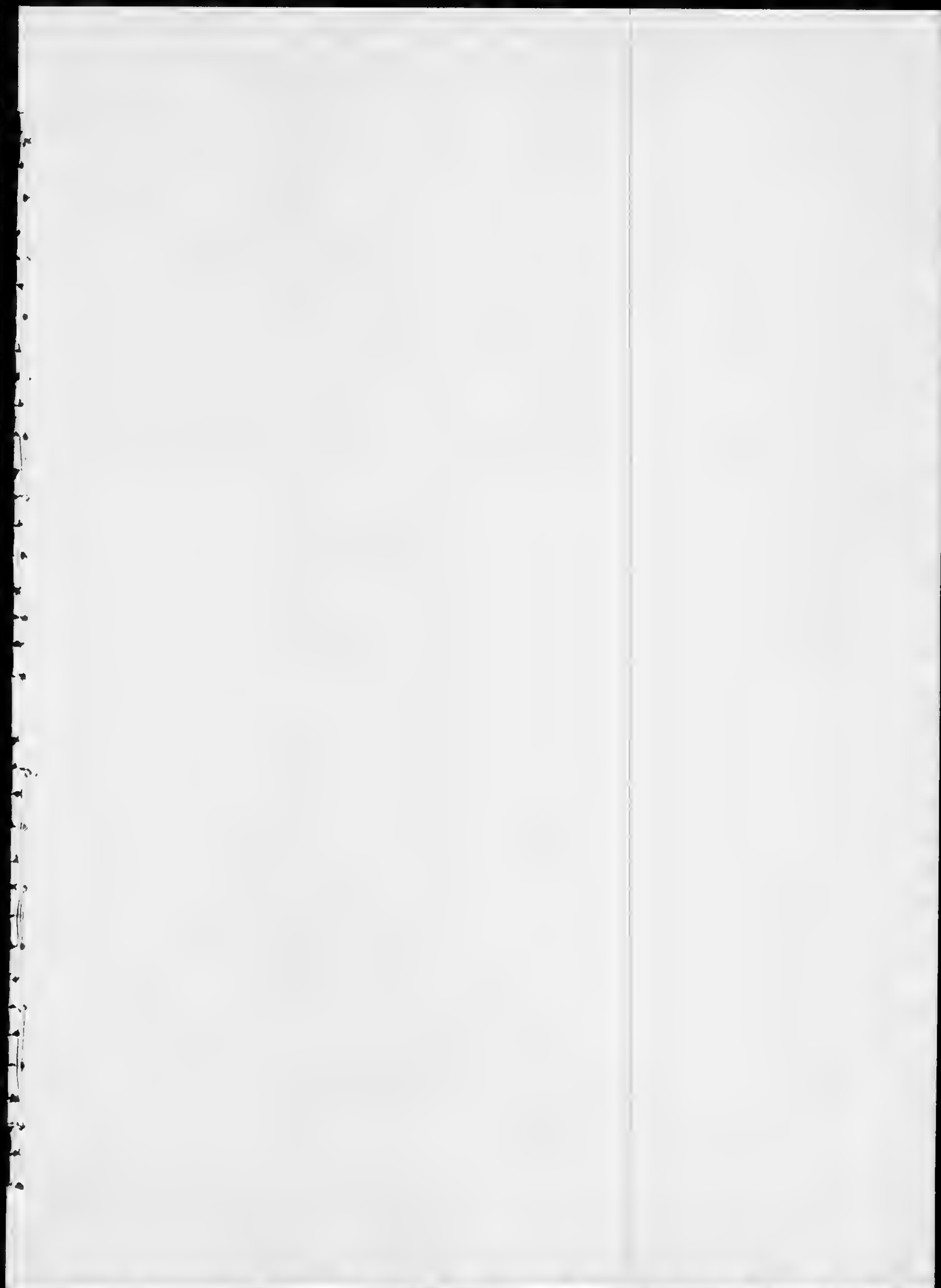
CONCLUSION

WHEREFORE, Appellant respectfully prays that the Judgment of the District Court be reversed, that the case be remanded with direction to issue an injunction to restrain the fraudulent transfer of property as prayed for in the Complaint, and for such other and further relief as to this Court seems just and proper.

DIANA KEARNY POWELL,

1500 Massachusetts Avenue, N. W.
Washington, D. C. 20005

Appellant.



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COUNTERSTATEMENT OF QUESTION PRESENTED

In the opinion of Appellee the question presented is whether the Court below was correct in dismissing with prejudice Appellant's complaint to enjoin distribution of a trust estate on the grounds of fraud, when Appellant's allegations had been the subject matter of prior litigation between the parties and determined by final decree not to state a claim upon which relief could be granted.

COUNTERSTATEMENT OF THE CASE

On May 29, 1968, Appellant filed in the Court below a complaint to enjoin the distribution of the trust estate created under the will of her deceased grandmother and namesake, Diana Kearny Powell, on the grounds of alleged fraud committed by Appellee, the Successor Trustee of that trust. Appellee moved to dismiss the complaint as *res judicata* on June 12, 1968. The motion was argued before Judge Sirica and granted and an order in conformity with the court's ruling dismissing the complaint with prejudice was entered July 5, 1968. This appeal followed.

ARGUMENT

This appeal marks the eighth time that Appellant has brought before this Court her contentions with respect to how the remainder of the trust estate created under the will of her deceased grandmother, Diana Kearny Powell, should be distributed and her claims of malfeasance on the part of Appellee. As long ago as October 5, 1960, the District Court construed the trust and directed Appellee to distribute a portion of the corpus to Appellant, rather than the whole to which she claimed to be entitled. She since has attacked the decision directly and collaterally, and this is but another effort on her part to circumvent a final judicial determination and prevent Appellee from making final distribution of the trust estate. The questions raised by Appellant are no longer open for review. *Powell v. National Savings and Trust Company*, 111 U.S. App. D.C. 290, 296 F.2d 412, *cert. denied*, 368 U.S. 946 (1961), *rehearing denied*, 368 U.S. 1005 (1962); *Powell v. National Savings and Trust Company*, 114 U.S. App. D.C. 269, 314 F.2d 274 (1963); *Powell v. National Savings and Trust Company*, No. 17,658, decided November 19, 1963, *rehearing en banc denied*, January 15,

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CONCLUSION

It is respectfully submitted that this Court should either affirm the order of the District Court or dismiss the appeal as frivolous.

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